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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

## No. 231

ANNA DESPER, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. DESPER, JR., DECEASED,

*Petitioner,*

vs.

STARVED ROCK FERRY COMPANY,
A CORPORATION,

*Respondent*

## RESPONDENT'S BRIEF.

CHARLES T. SHANNER,
CHARLES WOLFF,
THOMAS C. ANGERSTEIN,
GEORGE W. ANGERSTEIN,
135 South LaSalle St.,
Chicago, Illinois,
Attorneys for Respondent.

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# RESPONDENT'S BRIEF.

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

## Statement of the Case.

### The Facts.

The Court of Appeals' statement of the facts is accurate and affords a proper understanding of the case. However, it is believed a few added details of the case as shown by the record will afford a helpful supplemen-

tation and provide a more complete presentation of the essential facts and circumstances.

Among the five or six men who comprised the working force of the defendant at about the time of the accident, there was a painter, a painter's helper, a machinist, a laborer and a welder, some of whom had no connection whatsoever with the operation of the motor launches during the operating season. (Rec. 61, 62, 113.) These men performed the sundry tasks which were mentioned in the Court of Appeals' statement.

Further, during the period of the re-employment of petitioner's intestate, Thomas J. Desper, hereinafter referred to as Despor, and up to the date of the accident, the motor boats remained on dry land and neither the boats nor the barges were moved. (Rec. 63, 64, 92, 108, 109.) The men employed by respondent during the period in question worked eight hours per day at a stipulated hourly rate, except the painter who worked under a contract. (Rec. 116, 126, 179, 180.) With the exception of one, George Claudnic, the only year-round employee in respondent's employment and whose combined duties included at various times the work of a machinist, foreman, watchman, and during the operating season, those of an operator of a sight-seeing launch, the men neither ate, nor were furnished with quarters on board any vessel. (Rec. 129.) Moreover, no ship's discipline was maintained. (Rec. 182.) During the time Desper was employed by respondent, he lived at home. (Rec. 165, 166.)

The additional facts stated on pages 6 and 7 of the PETITION that seamen operating small boats on the Illinois River never worked under ship's discipline or lived on the boats are without evidentiary support in the record.

Likewise, petitioner is in error in referring to Desper as a "licensed navigator" inasmuch as the only license Desper had was a license to operate a small motor launch during the season. He did not have a navigator's license, but instead had only what might be termed an "operator's" license. (Rec. 87, 224.)

## The Questions Presented.

Respondent believes that the questions presented may be more accurately stated as follows:

1. Whether the word "seaman," as used in the Jones Act means a member of a crew of a vessel plying navigable waters.

2. Whether the statute of one as a member of a crew of a vessel is determined by (a) the nature of his services at the time of the accident, and (b) whether the services then being performed were rendered in navigation.

3. Whether the 1939 amendment to the Federal Employers' Liability Act is applicable in determining if an employee is a seaman within the meaning of the Jones Act.

## I.

## The Court of Appeals Did Not Place a Narrow Construction on the Jones Act.

Petitioner's argument in support of her contention in this Court begins on page 8 of her PETITION with the assertion that the decision of the Court of Appeals results in denying to seamen the benefits of the Jones Act.

It is respectfully submitted that the clear language of the decision does not permit of such construction. Under

the principles of law and conclusions therein stated, the decision does not deny to any seamen the benefits of the Jones Act. The decision simply holds that under the undisputed facts as shown by the record in the instant case, Desper was not a seaman within the meaning of the Jones Act.

The position of the Court of Appeals on this point is in accordance with both statute and authority.

In 1927, the Congress enacted the Longshoremen's and Harbor Worker's Compensation Act (44 Stat. 1424, 33 U.S.C., sec. 901, et seq.) section 2(3)(4) of which provides as follows:

> "(3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> "(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

The policy as thus expressed by the Longshoremen's Act was examined and the narrowing effect of its provisions upon the interpretation of the word "*seaman*", as used in the Jones Act, was judicially recognized in *South Chicago Coal and Dock Co.* v. *Bassett,* 309 U.S. 251, in which this Court said (p. 256):

> "* * * The bill, which became the Longshoremen's and Harbor Workers' Compensation Act, was at one stage amended so as to include a master and members of a crew of a vessel owned by a citizen of the United States. They preferred however to remain outside the compensation provisions and thus to retain the advantages of their election under the Jones

Act, and the bill was changed accordingly so as to exempt 'seamen.' Then, in its final passage, the words, 'a master or member of a crew' were substituted for 'seamen.' We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable waters, in the work of loading or unloading, were 'seamen.' *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50; *Northern Coal & Dock Co.* v. *Strand*, 278 U.S. 142. And, also, that such seamen if injured on a vessel in navigable waters, unlike one injured on land, could not have the benefit of a state workmen's compensation act. *Southern P. Co.* v. *Jensen*, 244 U.S. 205. We think it is clear that Congress in finally adopting the phrase 'a master or member of a crew' in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation statutes were inapplicable. * * *"

Thus it appears that the "narrow" construction of the Jones Act complained of by petitioner (PETITION, p. 8) is no more than a fair application of the legislative intent. To hold, as petitioner contends (PETITION, p. 17) that the "concept of seamen" should be enlarged "so as to include employees any part of whose duties are those of a member of a crew" would, in most instances, effect a judicial repeal of the Longshoremen's and Harbor Workers' Compensation Act, contrary to the express enactment of Congress and contrary to the construction and interpretation of the purpose and scope of such statute by this Court.

*O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 6, was decided since the decision in *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251. In the *O'Donnell*

case the plaintiff was a member of the crew of a vessel lying in port in navigable waters. Although the plaintiff was ashore when injured, recovery was permitted under the Jones Act, the Court stating the test of jurisdiction as follows (p. 42):

> "The right of recovery in the Jones Act is given to seamen as such and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted *but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.*" (Emphasis supplied.)

A later important decision directly bearing upon the point under discussion was given in *Swanson* v. *Marra Bros.*, 328 U. S. 1, in which case this Court said (p. 7):

> "*We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the Haverty Case only* such rights to compensation as are given by the Longshoremen's Act. *But since this Act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore. The Act leaves the injured employee in such cases to pursue the remedies afforded by the local law, which this Court as often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel.* * * *" (Emphasis supplied.)

The above-quoted rule of law, prescribing the legal basis for recovery under the Jones Act, made after consideration and analysis of the entire body of law pertaining to recovery by employees for injuries in maritime

work is definitive, determinative, and authoritative. It is respectfully submitted that it must now be accepted that in a suit under the Jones Act, in order to establish liability it must be proved that the injured employee was a member of a crew of a vessel plying in navigable waters.

What petitioner seeks to achieve under guise of liberal construction is to persuade this Court to become oblivious to the actual facts of the case, which are clearly stated in the opinion of the Court of Appeals, and to distort the plain meaning of the words of the rule of law as declared by this Court. The petitioner apparently wants this Court to hold that there is navigation when, in fact, there is no navigation and to hold that Desper was a member of a crew when there was no crew.

It is respectfully submitted the Court of Appeals in its decision correctly applied to the undisputed essential facts in this case the pertinent and relevant rules of law as declared by Congress in the Longshoremen's and Harbor Workers' Compensation Act and as expressed by this Court in the *Bassett, O'Donnell* and *Swanson* cases, *supra*. Respondent respectfully submits that a contrary holding would have constituted a disregard of established rules of statutory construction and the doctrine of *stare decisis*.

As was stated by the Supreme Court of Illinois in *Jones Foundry Co.* v. *Industrial Commission*, 312 Ill. 27:

> "We cannot stretch the law (Workmen's Compensation Act of Illinois) to embrace a case clearly not within the contemplation of the statute."

In *United States* v. *Grogg*, 9 F. 2d 424, on the point of liberality of construction, the court stated (p. 428):

"It is also argued that the act of 1904 is a remedial statute and should be liberally construed, so as to suppress the evil and advance the remedy • • • The duty to liberally construe remedial statutes *'stops far short of carrying the statute to purposes and objects entirely beyond those mentioned in it.'*" (Emphasis supplied).

The italicized language, which the court took from *Kellar* v. *James*, 63 W.Va. 139, 142 is peculiarly applicable to the instant problem and it is a judicial answer to petitioner's seeking in the instant case to extend the 1939 amendment to the Federal Employers' Liability Act to purposes entirely beyond those mentioned and wholly foreign to its intended scope and purpose. (See, also, *Standard Oil Co.* v. *Lane*, 75 Wis. 636; *Lake Shore & M. S. R. Co.* v. *Benson*, 85 Ohio St. 215; *Claussen* v. *Brothers*, 148 S. C. 1., and 50 Am. Jur., Statutes, sec. 387.)

The petitioner simply refuses to admit or concede the existence of plain and obvious facts. It cannot be questioned that respondent's boats were on dry land and had been there for five months, during which period they had not been moved a single foot in water or even on land. The boats were in various states of repair and one was being reconstructed. There is nothing narrow or technical about a truthful statement that such boats were not plying navigable waters and were not in navigation.

## II.

## The 1939 Amendment to the Federal Employers' Liability Act Is Wholly Inapplicable in This Case.

On pages 9 to 11 and, again, beginning on page 16 of the PETITION, it is urged that the provisions of the

Federal Employers' Liability Act,[1] and the 1939 amendment[2] to it, made Desper a seaman within the meaning of the Jones Act.[3]

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1. THE FEDERAL EMPLOYERS' LIABILITY ACT (35 Stat. 65, 45 U.S.C. sec. 51):

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

2. THE 1939 AMENDMENT TO F.E.L.A. (53 Stat. 1404, 45 U.S.C. sec. 51):

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as entitled to the benefits of this chapter."

3. THE JONES ACT (41 Stat. 1007, 46 U.S.C. sec. 688):

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

This argument begins with the suggestion that the word "employment" in two statutes should be identically construed. The one act affords a remedy to *any person* employed by a common carrier by railroad engaged in furthering or substantially affecting interstate commerce, whereas the Jones Act gives a right of action at law to any *seaman* injured in the course of his employment.

Thus it is manifest from the wording of the two statutes that the problem presented can neither be obscured nor solved by a dissertation on the meaning of the word "employment" or by a review of the decided cases construing the phrase "in the course of his employment."

Instead, the problem is to determine the meaning of the word "seaman" as used in the Jones Act and the answer to this problem already has been explicitly given by this Court in *Swanson* v. *Marra Bros.*, 328 U.S. 1, and *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36.

In view of this Court's having determined the meaning of the word "seaman" as used in the Jones Act, and it appearing from the undisputed facts in this case that Desper was not a "seaman" within the meaning of such term as declared by statute and as defined by this Court, it follows that petitioner's discussion of cases such as *Overstreet* v. *Northshore Corp.*, 318 U. S. 125, involving determination of the words "employment" or any other words or phrases other than "seaman", can be of no assistance to this Court and cannot vary the undisputed facts in the instant case so as to make Desper a member of the crew of a vessel.

That petitioner at last realizes the futility of her endeavor to apply the 1939 amendment of the F.E.L.A. to the facts of this case is apparent from her concession

that even if such amendment is inapplicable the error is harmless. (PETITION, p. 18.) Instructions Nos. 2 and 3 (Rec. 209-211) include this element of her theory of the case and were given by the trial judge. During the discussion of instruction No. 2 the following colloquy took place:

"The Court: Well, that is their theory of this law suit. If they can't sustain that theory, they don't have any law suit.

"Mr. Davidson (for petitioner): That is the whole thing in a nut shell." (Rec. 194.)

It is elementary that a litigant may not try his case on one theory in the court below and upon another in the reviewing court. (*Barnsdall Refining Corp.* v. *Cushman-Wilson Oil Co.*, 97 F. 2d 481.)

The 1939 amendment to the Federal Employers' Liability Act, by its very language and on its face, shows that it has no application to the Jones Act. The Jones Act adopts only such portions of the Employers' Liability Act as are germane to the subject of maritime law. The words of the 1939 amendment unmistakably indicate that such amendment was intended to be limited to interstate commerce by rail transportation.

In discussing the effect of a reference statute in 2 Lewis' Sutherland on Statutory Construction it is stated in sec. 405 as follows:

> "* * * When, so adopted, only such portion is in force as relates to the particular subject of the adopting act, and as is applicable and appropriate thereto."

A judicial statement of the same rule may be found in *Jones, et al.* v. *Dexter, Adm. et al.*, 8 Fla. 276, where

the court analyzes many earlier authorities, both American and English. The following quotation is from the headnote:

> "Where a statute has been enacted with special reference to a particular subject and by another statute its provisions are directed in general terms to be applied to another subject of an essentially different nature, the adopting statute must be taken to mean that the provisions of the original statute shall be restrained and limited to such only as are applicable and appropriate to the new subject."

And in *State* v. *Board of Commissioners*, 170 Ind. 595, the Supreme Court of Indiana said (p. 619):

> "* * * It is well settled that one statute may adopt a part of, or all of, another law or statute by a specific and descriptive reference thereto, and the effect is the same, as if the law or statute or the part thereof adopted had been written into the adopting statute. (Authorities cited) *When so adopted, only such portion is in force as relates to the particular subject of the adopting act, and is applicable and appropriate thereto.* (Italics supplied.)

In *Gadd* v. *McGuire*, 69 Cal. App. 347, the California court said (p. 369):

> "* * * It is well established that the Legislature may extend the provisions of an existing statute to a new subject by an appropriate reference to such statute in the new act, *only those provisions of the extended act being incorporated into the new one which are appropriate to the new subject.*" (Italics supplied.)

These cases are representative not of the great weight of authority but the unanimous opinions of all courts and text writers.

A few of the other manys cases are: *State* v. *Board of Commissioners*, 83 Kan. 199; *State* v. *Board*, 175 Ind. 400, and *Matthews, Finley & Co.* v. *Sands & Co.*, 29 Ala. 136.

It may be true that the amendment under discussion would have some effect if the words "interstate" and "or foreign" were stricken from it and the word "navigation" substituted for the word "commerce" but respondent respectfully and earnestly submits that such construction of the amendment would constitute unwarranted judicial legislation.

In this connection the very interesting case, *State* v. *Frear*, 144 Wis. 79, is especially in point. In such cited case the Supreme Court of Wisconsin had to determine the extent to which a primary election law incorporated the provisions of a general election law and which portions of the latter law should be and should not be applied in a primary election.

In an elaborate opinion, the Wisconsin court said, on page 99:

> "* * * By generously carrying out the algebraic processes of elimination, by substitution and by addition and subtraction, it is possible to so remold section 34 as to make it fit this case, but we do not think the Legislature intended that we should do so, or that the citizen should be obliged to go through such a process to determine what the statute law of the state is. We fail to see how the word 'vacancy' can be stricken from the statute, if it is to retain any life that would be helpful to the defendant, because it is only where a vacancy occurs that action can be taken by the party committee. * * *"

Common sense, reason, and logic demonstrate that petitioner's position is untenable; moreover, legal precedents,

without dissent, are in complete and harmonious rejection of the highly irrational theory she advances. Respondent respectfully and earnestly submits such legally unsupported theory should be flatly spurned by this Court.

The petitioner cites *Nordquist* v. *U. S. Trust Co. of N. Y.*, 188 F. 2d 776 (2d Cir.) which holds that an action under the Jones Act survives the death of the defendant. Such cited case actually is authority for the respondent for it sustains the proposition that the adopting statute adopts only such portions of the adopted act as relate to the subject matter. It should not require argument to demonstrate some kindredship between the two laws with respect to the survival of the action; however, such analogy does not make a seaman out of an ordinary land laborer. The maritime law has not indulged in this fiction. (*Long Island R. Co.* v. *Lowe*, 145 F. 2d 516.) The decisions in *Antus* v. *Interocean S. S. Co.*, 108 F. 2d 185; *Seneca Washed Gravel Co.* v. *McManigal*, 65 F. 2d 779, and *Taylor* v. *McManigal*, 89 F. 2d 583, are squarely against it. Desper could have the status of a member of a crew of a vessel only had his activities met the requirements of the legal definition of a member of a crew of a vessel plying navigable waters.

That the Federal Employers' Liability Act does not encroach upon the ancient maritime principles was established by this Court in *Arizona* v. *Anelich*, 298 U. S. 110, cited on page 9 of the PETITION. In such cited case the defense of assumption of risk was interposed because such defense at that time was meritorious in an action brought under the Federal Employers' Liability Act. In holding such defense to be without merit this Court said (p. 123):

"* * * The denial in the Federal Employers' Liability Act of the defense of assumption of risk refers only to suits founded on the Federal Safety Appliance Act, *applicable alone to railroads.* It can raise no inference as to the availability of the defense in suits brought to recover for injuries to seamen. No provision of the Jones Act is inconsistent with the admiralty rule as to assumption of risk. The purpose and terms of the Act *and the nature of the juristic field in which it is to be applied,* preclude the assumption that Congress intended, by its adoption, to modify that rule by implication. * * *" (Emphasis supplied.)

The statement on page 17 of the PETITION to the effect that the 1939 amendment to the Federal Employers' Liability Act is a Congressional mandate which requires a corresponding enlargement in the construction of the Jones Act is simply an assertion which cannot be legally supported. One law permits an action by railroad employees under certain circumstances because it expressly says so. The other Act—the Jones Act—does not say what petitioner contends it provides and it has never been so construed; it gives a right of action to seamen. The 1939 amendment affects railroad employees, as intended, and has no effect whatsoever on seamen for they are in a different "juristic field."

It may be that at some future time Congress will amend the Jones Act to extend its benefits to those whose duties "shall be the furtherance of" or shall "in any way directly or closely and substantially, affect" navigation. However, until such time, it is submitted that under the Jones Act as it presently stands, the remedy is available only to members of the crews of vessels in navigation.

Moreover, if the 1939 amendment to the Federal Employers' Liability Act is controlling, then the petitioner cannot recover in this case for Desper was never, even in the remotest degree, engaged in the furtherance of interstate commerce. His claimed position (furthering the operation of an intrastate movement on a river which may be used as an artery of interstate commerce) is precisely the same as that prevailing on a local suburban train which happens to run on a track which is also used by interstate trains. It is well settled that such employee has no right of action under the Federal Employers' Liability Act. (See: *Boston & M. R. R. Co.* v. *Armburg,* 285 U. S. 234.)

## III.

## The Court of Appeals Properly Decided That Desper Was Not a Member of a Crew.

### (a) The Court of Appeals did not usurp the function of the jury.

The petitioner urges that the Court of Appeals substituted its judgment for that of the jury and in support of such contention, on pages 18 and 19 of her PETITION she cites a number of cases, including *South Chicago Coal and Dock Co.* v. *Bassett,* 309 U. S. 251.

The *Bassett* case is no authority for the proposition that the Court of Appeals may not properly enter judgment for defendant on the question whether or not sufficient evidence was produced to establish that Desper was a member of the crew. It is here pertinent to observe, however, that in such cited case this Court held (page 260) that the term crew embraces those who are naturally and *primarily* on board the vessel to aid in her

navigation. Thus, has this Court heretofore answered the contention advanced on page 19 of the PETITION that employees are seamen and are granted benefits under the Jones Act if *any part* of their duties is in furtherance of navigation.

No attempt will be made to discuss individually each of the other cases petitioner cites in this connection but it may be remarked that in those other than the railroad cases (which, manifestly, are not in point) each one involves the question of whether or not a person was a member of a crew or a harbor worker and in each case the vessel in question was actually lying (or plying) in navigable waters and there was some evidentiary basis for finding the plaintiff to be a member of the crew. Not one of the cases cited by petitioner involved employment on or about a boat which was blocked and cribbed on dry land for a period of five months, or for any other length of time. In not one of such cases were the present and actual duties or tasks of employment disregarded and the decision based either on what was considered to be the main purpose of the hiring (where that differed from the duties actually performed) or on proposed future employment and future duties.

It repeatedly has been held that where no factual issue has been raised, it is the duty of the trial court to direct a verdict. In *Brady* v. *Southern R. Co.*, 320 U. S. 476, the Court said (p. 479):

> "* * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such

direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. (Cases cited.)"

Though the petitioner argues that this Court has consistently adhered to the position taken in *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, she cannot deny that the effect of the decisions in *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251, and *Swanson* v. *Marra Bros.*, 328 U. S. 1, is, at least, to limit recovery under the Jones Act to members of a crew. Moreover, petitioner's statement that the Longshoremen's and Harbor Workers' Compensation Act left unaffected the rights "of other seamen" to recover under the Jones Act begs the question for it assumes that Desper was a seaman as such term has been defined by this Court. That such assumption is without merit is conclusively demonstrated by the holdings in the *Bassett* and *Swanson* cases.

**(b) Whether Desper was a member of the crew of a vessel is determined by (1) the nature of the services of his employment at the time of the accident, and (2) the fact whether the services then being rendered were performed in navigation.**

(1) *The Nature of the Services Rendered are Determinative.*

The decisive test in this case is the nature of the relationship of the employee to a vessel plying in navigable waters and the character of the services rendered to such vessel. The nature of such relationship has been subject to judicial interpretation on many occasions.

In the leading case—*South Chicago Coal Co.* v. *Bassett*, 309 U.S. 258—where an employee sustained a fatal accident while at work on a vessel, the court said (p. 260):

"This (Longshoremen's) Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, *supra*), were still regarded as distinct from members of a 'crew'. They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation. See *De Wald* v. *Baltimore & O.R. Co.* (CCA 4th) 71 F. 2d 810; *Diomede* v. *Lowe*, (CCA 2d) 87 F. 2d 296; *Moore Dry Dock Co.* v. *Pillsbury*, (CCA 9th) 100 F. 2d 245.

"The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the court considered as supporting the finding of the deputy commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water.'"

It is therefore obvious that not every person who renders services on board a vessel is a member of the crew even though his duties are in furtherance of navigation in the sense petitioner uses such phrase. Besides the specific nature of the actual work performed, certain other indicia are conclusive in determining the line of demarcation between members of a crew and ordinary shore or harbor workers. These conditions are outlined

concisely in *Moore Dry Dock* v. *Pillsbury*, 100 F. 2d 245, where the court held one is not a member of a crew who is paid on an hourly basis rather than monthly, who neither eats nor sleeps on board a vessel, and who does not surrender his personal rights and liberties as a seaman in exchange for maintenance, cure and wages.

So in *Henderson* v. *Jones*, 110 F. 2d 952, an employee of a river vessel which was tied up whose duties were to fire a boiler, who had signed no seaman's articles, who was paid by the hour only for the actual hours worked and who ate and slept at home and worked only on the days needed, was held not to be a member of the crew.

And in *De Wald* v. *Baltimore & O. R. Co.*, 71 F. 2d 810, a claimant whose principal work was in loading and unloading and keeping a record of the cargo, and who occasionally handled a line to make a barge fast at a dock, or to pump water out of it, and who did not live upon the barge but went home every night, was held not to be a member of a crew.

In *Domede* v. *Lowe*, 87 F. 2d 296, upon facts substantially similar to those in the *De Wald* case, except that the claimant lived on the barge, it was held he was not a member of the crew.

Many other cases involving the same question may be cited and while absolute agreement in all factual details cannot be expected, in the main the principal test for determining the legal status of a given person on board a vessel, *i.e.* whether or not he is a member of the crew, is whether his services are chiefly to aid in navigation. *Taylor* v. *McManigal*, 89 F. 2d 583; *Norton* v. *Warner Co.*, 321 U.S. 565; *Schantz* v. *American Dredging Co.*, 138

F. 2d 534; *Spencer & Son Corp.* v. *Lowe*, 152 F. 2d 847; *Hagens* v. *United Fruit Co.*, 135 F. 2d 842.

In the case at bar, Desper rendered no services in "aid of navigation" as that phrase is defined in the foregoing cases. If the duties and activities of Desper are considered from the date he began employment in March 1948, until the date of the accident, every service and duty which he performed was that of a shore worker. Despite what his duties might have been in the summer season, no service or duty which he actually did perform at the time of the accident had reference to the present navigation of a vessel or the movement of a vessel; the launches were on dry land and had been there since the previous November. Furthermore, Desper did not eat or sleep on board a vessel; he worked eight hours a day, was paid at an hourly rate, spent all of his time on shore or on the barges and did not incur the hazards of the sea; nor was he subject to ship's discipline, nor was he assigned to a specific vessel. Neither the work he performed nor his relationship to any vessel was such as to constitute him a member of the crew of any vessel. Unless almost each and every distinction developed in the above-cited cases is to be wholly disregarded, the decision of the Court of Appeals is correct.

(2) *The persons rendering services to vessels not in navigation are not deemed members of a crew of a vessel.*

The respondent was engaged in no operations at the time of the accident which can be legally characterized as "navigation."

In *Antus* v. *Interocean S. S. Co.*, 108 F. 2d 185, the accident occurred shortly after the sailing season ended and when the ship was being put in winter quar-

ters; claimant, who had been a member of the crew during the sailing season, had been paid off, but had been retained on board to assist in laying up the vessel, and while doing such work he was hurt. In holding that at the time of the accident there was no crew on board, the court declared that the fact he had at one time been a member of the crew was of no significance. The court said (p. 187):

> "But the question is whether at the time of the accident he was engaged in maritime work and the test is the nature of his employment at that time. While the work done had direct relation to navigation, it neither was performed during the navigation season, nor was it even preparatory to navigation. Appellant was laying up the engine and packing the pumps and seacocks so that they would not freeze. He was taking bolts out of the piston-heads, an operation which was never done during navigation. It would have taken from four to eight hours to put the engines together again to operate. The vessel, while not consigned to a ship's graveyard, was tied up to the piles. Instead of doing this work in preparation for navigation, the men were preparing this vessel for winter quarters. *Appellant was not subjected to any maritime hazards. The fact that he had been, or expected in the future to be a seaman does not render maritime work which was not maritime in its nature. The finding of the District Court upon this point was correct, and appellant was not at the time of his injury a seaman. Therefore he was not entitled to sue under section* 668 *of Title* 46, *U.S.C.*, 46 *U.S.C.A.* 688.
>
> "Neither was appellant at the time of the injury a member of the crew. *The most that may be said is that he (appellant), with the other men working on the boat, expected to become members of the crew when it was organized and when the vessel was ready to sail.*" (Emphasis supplied.)

In its decision, in referring to *Taylor* v. *McManigal*, 89 F. 2d 583, the court then stated (p. 187):

> "There, as in the instant case, appellant was not at the time of the accident a member of the ship's crew which mans and navigates the vessel, for no crew was on board."

*Seneca Washed Gravel Co.* v. *McManigal*, 65 F. 2d 779, is also in point. In that case the claimant was a watchman on a vessel which was still in winter quarters at the time he was injured. The ship was not placed in service until two weeks after the injury. He was held not to be a member of a crew.

Another case controlling on this point is *Taylor* v. *McManigal*, 89 F. 2d 583. In such cited case the deceased was hired for the season as an assistant engineer on a vessel but, when injured, he was doing general labor work on such vessel before the season started and as a part of fitting-out the ship. It was held that the claimant was not a member of the crew.

In *Gonzales* v. *United States*, 3 F. 2d 168, where injuries were sustained on a vessel which was part of a laid up fleet, it was held that the claimant was not a seaman. The court said that the test which determines whether they are seamen entitled to sue under the Jones Act is "navigation."

And in *Hawn* v. *America S. S. Co.*, 107 F. 2d 999, a suit arising under the Jones Act, the injuries occurred aboard a vessel lying in navigable waters which was being used to store grain. It was held that the vessel, being presently withdrawn from navigation, had no crew.

While a vessel temporarily out of service may be considered still in navigation as where the crew is kept

intact and ship discipline observed, nevertheless, where it is laid up for the winter or for a long period of repairs, its crew discharged and separated, it is then effectively withdrawn from navigation and commerce. *Union Oil Co.* v. *Pillsbury*, 63 F. 2d 925. Until it is returned to, and again has entered navigation, persons employed about such a vessel cannot be considered as members of a crew, but are merely a gang of shore workers.

## IV.

### Desper's Work Was Not Maritime But, Even If It Were, Petitioner Cannot Recover Damages Under the Jones Act.

On page 14 of the PETITION a number of cases are cited in support of petitioner's argument that at the time Desper sustained his fatal injuries he was engaged in maritime employment. These cases are distinguishable in that they all involve either maritime contracts where a different test is applied to determine whether or not maritime law controls, or torts occurring on navigable waters, not on land. The respondent submits that cases such as *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263, *Frankel* v. *Bethlehem-Fairfield Shipyard*, 46 F. Supp. 242 (cert. den. 319 U.S. 746.) and *Massman Const. Co.* v. *Bassett*, 30 F. Supp. 813, are authorities which compel the conclusion that Desper's employment was non-maritime.

However, the point is not particularly relevant for whether or not the services performed by Desper were maritime the petitioner must fail in her action.

Since the enactment of the Longshoremen's and Harbor Workers' Compensation Act, maritime workers "in whole or in part" except the master and members of a crew, under the provisions of paragraphs (3) and (4) of section 2 of such Act, who are injured on navigable waters, have their remedy under such Act, and not under the Jones Act. The crucial inquiry, therefore, is the question of Desper's status as a member of a crew of a vessel in navigation, not whether his work was, in one respect or another, maritime. Petitioner's argument is that because all persons under the Jones Act are subject to maritime law all persons subject to maritime law are under the Jones Act. If such contention is reduced to syllogistic form its fallacy is immediately perceived.

Moreover, both parties hereto have submitted to the jurisdiction of the Industrial Commission of Illinois; there has been an award in petitioner's favor but she has sought a review of such award. (Rec. 15, 27, 28, 245, PETITION, p. 7.)

Under recent decisions of this Court, it is now definitely established that injuries or fatalities suffered by employees doing work of the nature and kind Desper was performing in the instant case, are properly compensable under state workmen's compensation laws and that jurisdiction is properly before the state industrial commission. See *Bethlehem Steel Co.* v. *Moore,* 335 U.S. 874, affirming *Moore's* case, 323 Mass. 462, and *Baskin* v. *Industrial Accident Commission,* 338 U.S. 854, vacating the judgment entered in *Baskin* v. *Industrial Accident Commission,* 89 Cal. App. 632, and remanding the cause for reconsideration, which was later given in *Baskin* v. *Industrial Accident Commission,* 97 Cal. App. (2d) 257 (aff'd. 340 U.S. 886.)

## V.

**The Decision of the Court of Appeals Is Not in Conflict With the Decisions Cited on Pages 14 to 16 of the Petition.**

*Hunt* v. *United States*, 17 F. Supp. 578, cited on page 15 of the PETITION, was decided before the *Marra* case, but is not inconsistent with it. Hunt was admittedly a seaman; the vessel was tied up awaiting its next voyage, and moreover, Hunt "slept and ate on the boat, was subject to discipline demanded and the orders and directions given by the master and/or chief officer directly, or through the boatswain." Under the record in the instant case there was no ship's discipline; there was no master; there was no chief officer; there was no boatswain, and Desper neither slept nor ate on any vessel but instead lived at his home.

Moreover as the Court of Appeals said, the *Hunt* case "merely serves to emphasize the factors, lacking in the case at bar, which serve to make one a seaman for the purposes of the Act."

*United States* v. *Lindgren*, 28 F. 2d 275, referred to on page 15 of the PETITION, is not in point for at least two reasons: *First*, it was admitted by the pleadings in such cited case that the decedent, who was signed as third mate, was a seaman, and *second*, the court relied principally on the *Haverty* case as precedent for its decision, a case which no longer is an authority on the point here at issue.

*Jones* v. *Shepard*, 20 F. Supp. 345,—a District Court opinion which was not appealed—is also cited on page 15 of the PETITION. There, apparently, the deceased was

recalled *as a member of the crew* the day before the ship was to sail and on that date was killed. He was and had been doing work that a roustabout would do, whether or not the vessel was in motion. Such a case is not authority in the instant case where, according to the record, Desper was hired to do "general labor." (Rec. 87.)

It may be pertinent to observe that the *Hunt*, *Lindgren* and *Jones* cases are all cited in *Weaver* v. *Pittsburgh Steamship Co.*, 153 F. 2d 597, also cited on page 15 of the PETITION. The *Weaver* case arose under the Fair Labor Standards Act. Thus, it does not involve the Jones Act, the Longshoremen's Act, or even an ordinary libel. The distinction between the cases petitioner cites and the one at bar is aptly illustrated by the language of the court in the *Weaver* case (page 601 of the report) in distinguishing it from the *Taylor* and *Antus* cases.

Petitioner also relies on *Daffin* v. *Pape*, 170 F. 2d 622, which is purportedly summarized on page 15 of the PETITION. Such cited case is directly in point on the proposition elsewhere herein urged by the respondent, namely that the character of the work being done at the time of the injury determines the injured's status as a seaman. In the *Daffin* case the Court of Appeals flatly rejected the contention that the general character of the deceased's employment rather than its nature when he was fatally injured should determine whether the Jones Act afforded a remedy. The following quotations from the opinion are on that point:

> (P. 624) "We think it clear from the *Warner Co.* case (*Norton* v. *Warner Co.*, 321 U.S. 565) that, *since the facts having to do with the services Daffin was performing on the yacht at the time of the injury* are undisputed, the question whether he was a mem-

ber of the crew * * * is a question of law * * *. The yacht *at the time* was in port, yet it nevertheless must be considered to have been in navigation, for it remained in readiness for another voyage.

(P. 625) "* * * *The employee's duties on the day of the accident are the critical facts which should determine his status as a member of the tug's crew.* It is true that if he had been called aboard for a single act of service, he might not become a member of the crew. But on the days when his employer assigned him to serve as a 'mate' of the vessel, we hold that he was a crew member, although he might cease to be one on days when he was assigned for other duties. See to the same effect *Maryland Casualty Co.* v. *Lawson*, 5 Cir., 94 F. 2d 190; *Osland* v. *Star Fish & Oyster Co.*, 5 Cir., 107 F. 2d 113." (Emphasis supplied.)

## Conclusion.

No substantial questions are raised in the PETITION which have not heretofore been settled and decided by this Court adversely to the petitioner's contentions. The decisions of the several Courts of Appeals are not in conflict, but on the contrary, all are in accord with the opinion filed in this case. Desper was not a seaman within the meaning of the Jones Act; he was not attached to any vessel; he was not engaged in navigation upon navigable waters; he had not signed ship's articles; he was not subject to ship's discipline; there were no master, mates, or other ship's officers, and Desper was not

furnished maintenance, cure, lodging or sustenance. The PETITION for WRIT of CERTIORARI should be denied.

Respectfully submitted,

CHARLES T. SHANNER,
CHARLES WOLFE,
THOMAS C. ANGERSTEIN,
GEORGE W. ANGERSTEIN,
135 South La Salle Street,
Chicago, Illinois
*Attorneys for Respondent.*